altogether? Instead of that they make first one small alteration and then another leaving the main feature unchanged. I am forced to the conclusion that some over zealous employee of the Defendants in Denmark took the Plaintiffs' label as his basis and hoped the differences introduced were so great that no Court would say that the use of the flower and the buds could mislead.

It only remains to deal with some points raised by the Defendants.

Mr. Page made a strong point of the alleged fact that the lotus is a very well known flower in Singapore. On the evidence I am satisfied that whilst it may be well known to educated Chinese and in China it is very little known among illiterate Asiatics in Malaya. He contended that no one can have the exclusive right to a common term such as flower and relied upon the decisions in *Boord* v. *Bagots Hutton* (1916) A.C. 382. *In re Dexter*, (1893) 2 Ch. 262. It seems to me that those cases are clearly distinguishable from the present one. In both of them evidence was called which established that the mark in question in the one case a cat and in the other a star were common to the particular trade. No such evidence was called in the present case. Furthermore those were both cases of applications to register a trade mark and as Lord Haldane pointed out in *Boord's* case (at page 396) the difference in character ought always to be borne in mind between the question in a case where a man is trying to deceive by passing off his goods as those of another and the question of interference with proprietary right which is what the registrar has in the first instance to consider in deciding whether registration ought to be allowed of a trade work bearing some resemblance to another. He went on to say:

> "If this difference in the questions is attended to, I think that it will be found that the authorities cited at the Bar on this appeal can, in the main, be classified and reconciled. It is for the most part where the difference has been forgotten that obscurity in expression has arisen."

Finally it was argued that supposing it were held that there was a probability of deception by the use of the label D with the buds on but no such probability by the use of label E with the buds removed, there was no necessity for the Plaintiffs to bring this action as the use of label D was being discontinued and the damages occasioned by its use are very small. I am unable to agree with this view. At the date of issue of the writ 6th January 1932 label D was still being sold on the Singapore market and the Plaintiffs had no means of knowing how many such tins were being sold.

In my view the Plaintiffs are entitled to an injunction in respect of both labels D and E and the consequential relief asked for.

Judgment accordingly.

Solicitors for the Plaintiffs—
Donaldson & Burkinshaw.

Solicitors for the Defendants—*Allen & Gledhill.*

[APPELLATE CRIMINAL JURISDICTION.]

REX .. .. **Respondent**

vs.

TAY THYE JOO .. .. **Appellant**

[SINGAPORE MAGISTRATE'S APPEAL No. 38 OF 1932]

Criminal law—joinder of charges—charges of cheating and alternative charges of abetment whether rightly joined—S. 172 Criminal Procedure Code.

When a person is charged in three separate charges with offences of the same kind committed within the space of twelve months he may be charged in the alternative with abetment of the three offences.

APPEAL from the conviction by the Criminal District Judge on 3 charges of cheating offences punishable under section 420 of the Penal Code. Charges of abetment of these offences were also added to the principal charges. One of the issues raised in the appeal was whether there was a proper joinder of charges.

W. A. N. Battenberg (*Knowles* and *H. R. Wilson* with him) for Appellant.

There has been misjoinder in that six offences have been charged. An offence and abetment of that offence cannot be tried together as these are distinct and different kinds of offence. Cr. P.C. Section 169.

Section 172 only applies when it is doubtful what offence the facts prove, not when it is doubtful what facts can be proved. To prove abetment one must prove not only the offence committed but also instigation and so one must go outside the facts of the offence abetted. Sohoni 1927 Edition p. 586. *R.* v. *Dass* I.L.R. 51 All. 544.

McElwaine, D.P.P. for the Crown.

Emp. v. *Thibhovandas* I.L.R. 33 Bom. 77 at 86 and *In re Gangadhar Tilok* I.L.R. 33 Bom. 221 at 237-8 are preferable to *R.* v. *Dass* (*supra*) and decide that the exceptions mentioned in Section 169 Cr. P.C. are cumulative. An offence and its abetment must in the nature of things be "in the same transaction." Section 171. There are not six distinct offences charged. Only three offences are alleged and these are of the same kind, and on the same facts alternative not additional, charges are laid.

On the charges as laid accused can only be convicted of three offences.

Proof of instigation is nothing more than evidence connecting the accused with the offence. Abetment and the offence abetted are punishable under the same section of the Penal Code and with the same punishment and therefore are offences of the same kind Section 170 (1) (2).

The charges are in accordance with the practice of the Courts and are justified by Section 172. *R.* v. *Begu* L.R. 52 I.A. 191.

Cur. Ad. Vult.

TERRELL, J.—The accused was tried before the District Judge Singapore on three charges of cheating alleged to have been committed on 1st June, 1932, in respect of a sum of $10,500, on the 4th June, 1932, in respect of a sum of $15,250, and on the 6th June, 1932, in respect of a sum of $14,250, all these offences being punishable under Section 420 of the Penal Code.

To each of the charges was added an alternative charge that the accused abetted one Koh Eng Hoe in the cheating alleged in the principal charges. The alternative charges are punishable under Sections 109 and 420 of the Penal Code.

The first point argued by appellant's Counsel was that there had been a misjoinder of charges on the ground that in effect there were six charges against the accused instead of three only as provided by Section 170 of the Criminal Procedure Code, this section providing an exception to Section 169 under which every charge must be tried separately.

Mr. Battenberg cited an Indian authority, *Emperor* v. *Janeshar Das*, I.L.R. 51 Allahabad, page 544, to the effect that the provisions of Sections 234, 235, and 236 of the Indian Criminal Procedure Code, corresponding to Sections 170, 171 and 172 of our Criminal Procedure Code, are mutually exclusive. On the other hand the Bombay High Court has decided in *Re Tilak*, I.L.R. 33 Bombay, page 221 at page 238, that these sections are cumulative and not mutually exclusive. I have no hesitation in adopting the view of the Chief Justice Sir Basil Scott in the last mentioned case. It follows, therefore, that where there are three offences charged under Section 170 (1) there may in a proper case also be alternative charges under Section 172.

Mr. Battenberg further argues that Section 172 the alternative charge section, was very limited in its operation. The section reads as follows:—

> "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of the said offences."

Mr. Battenberg relied on a passage in Sohoni 13th Edition page 586 where it is said "The section relates not to distinct acts but to a single act or series of acts where the facts being ascertained it is doubtful which of several sections is applicable." This dictum is supported by the case in 51 Allahabad cited above where at page 549 Dalal, J. states "when a man is charged in the alternative with embezzlement or abetment thereof he has to meet two distinct sets of charges." I have already stated that I cannot accept this case as an authority and I entirely dissent from the dictum in Sohoni quoted above. It is noticeable that in a later passage on page 587 Sohoni admits that when the section says "it is doubtful which of *several offences* the acts which can be proved will constitute." 'Several offences' may mean offences under different sections of the Penal Code as well as offences punishable under the same section. As an example, a man may be charged in the alternative with having stolen property and having received it, Sections 47, 379 and 411 of the Penal Code (see note 5).

In view of the inconsistency of the Indian decisions, I propose to consider the sections on their merits. Mr. Battenberg argued that Section 172 only applies where it is doubtful if the facts proved will constitute a major or minor charge of the same kind *e.g.* voluntarily causing hurt and voluntarily causing grevious hurt. To my mind it is quite clear that this is not the meaning of the section as the next sections 173 and 174 provide that the accused may be convicted of a lesser charge or even of a charge different to the one on which he has been tried without such charge being framed. A familiar case is when the accused is charged with murder and found guilty of culpable homicide not amounting to murder, and in the case of *Begu* v. *The King Emperor*, L.R. 52 I.A. page 191 the Privy Council upheld a conviction of concealing evidence, section 201 of the Penal Code, when the accused had been tried on a charge of murder. I think that section 172 means what it says, namely that it is doubtful what facts can be proved. Until they can be proved it is difficult to say what offence has been committed and accordingly an alternative charge can be framed. Another way of putting it is that the exact relation of the accused to the offence in question has not been fully ascertained. There can I think be no doubt

that Section 172 contemplates a slightly different set of circumstances sufficiently different in fact to make it possible that the proper charge is under a different section of the Penal Code. If the section had the meaning suggested by Mr. Battenberg it would be superfluous as when the facts proved indicate a lesser charge, as opposed to a different charge, the matter is provided for by section 174 and no alternative charge is necessary. It is to be noticed that in the charges now before the Court there are in fact only three offences and not six offences, and that in view of Section 71 of the Penal Code the accused cannot be punished under the original charge *and* the alternative charge when the offence falls under different definitions of law.

I find therefore that the charges were properly framed. I may add that the charges were framed in accordance with a practice which has been followed in this Colony for many years and which I should only disturb in deference to the ruling of a Court of superior jurisdiction.

On the merits of the appeal the appellant's chief argument was that there was no evidence that the copra had not in fact been delivered though it may have been stolen after delivery. The grounds of judgment appeared to lend some colour to this argument, as the learned District Judge nowhere refers to the deliveries which should have been made against the payments which are the subject matter of the charges. In paragraph 6 he states "copra value over half a million dollars was not delivered and accused now stands charged with cheating the Company or abetting the cheating of the Company of this amount." Again in paragraph 18 he states: "he undobtedly deceived the complainants and intentionally caused them to pay money. Since no copra was got in return this has caused them loss."

Taking the two paragraphs together it would appear that the learned District Judge had in mind the total shortage of 6,400 tons having a value of more than half a million dollars. Now it is quite clear that notwithstanding these enormous shortages copra was in most cases delivered when a payment was made. For instance, Mr. Folmer states that the total account was over $2,000,000 and as the shortage was only $500,000 copra must have been duly delivered in three cases out of four, and if the evidence had stopped there the particular payments which are the subject matter of the charges might have been in respect of actual deliveries.

In his reply the learned D.P.P. was able to satisfy me on this point. The system adopted by the complainants was that the accused was the only supplier of copra except in cases where the accused could not supply himself, in which case he would get the copra from other dealers whom the Java Sumatra Trading Company would pay direct. It follows that the Java Sumatra Trading Co. would only pay the accused for copra actually supplied by him. It was proved from the evidence of the accused's own books that he did not supply any copra in respect of the copra for which he was paid on the 1st, 4th and 6th June, 1932. On the face of it therefore he induced the complainants to part with cheques for copra which was not in fact supplied.

I agree with the learned District Judge that it must be proved that he acted intentionally or in other words dishonestly. The learned District Judge does suggest that on the mere wording of Section 415 proof of a dishonest intention does not appear to be required, but I have no doubt that the second part of Section 415 implies a fraudulent or dishonest intention just as much as the first part. As, however, the learned District Judge has found on general principles that proof of a guilty intention is essential in criminal matters it is immaterial that he has given Section 415 a narrower construction than I think it naturally bears.

It is suggested that the accused may have honestly believed Koh Eng Hoe, and that he had the right to assume that the complainants' servant was doing his duty. I consider this explanation quite untenable. To begin with I have already referred to the course of business, and if the accused had honestly believed that the copra had been delivered he would have entered the deliveries in his books and credited Koh Eng Hoe. The fact was that Koh Eng Hoe was heavily in the accused's debt, and the accused wished to reimburse himself. In connection with the copra the subject of the first charge, he says in his own evidence:—

> "I made no delivery of that copra. Delivery of that copra was made by someone through Eng Hoe. I should not know if he had not got it. At that time Eng Hoe had sufficient of my money to pay for that copra."

That means that Koh Eng Hoe was indebted to the accused and at the most that he expected Koh Eng Hoe to produce copra against the cheque which the accused had received. But was there any basis for this expectation? He admits he would not even know if Koh Eng Hoe had not got the copra. The inference is that the accused would not even trouble to see that the copra was delivered and so implement the representation which he had knowingly made that the copra

was in the godown. Even if he had seen the copra was delivered subsequently he still cannot get away from the fact that the representation under which the Java Sumatra Trading Co. parted with their cheque was at the time false to his knowledge.

There are many other indications in the evidence which point the same way. It is beyond dispute that the accused and Koh Eng Hoe had a working arrangement and that to a large extent the accused financed him. Koh Eng Hoe made large losses. These losses consisted of money owing by the accused to the Java Sumatra Trading Co. for differences in price, shortage, etc., and which Koh Eng Hoe owed the accused. It is quite obvious from his subsequent disappearance that Koh Eng Hoe could not pay, and the inference is irresistible that at the beginning of June the accused knew the position and tried to reimburse himself, no doubt with the connivance of Koh Eng Hoe, by obtaining payments for copra which never existed. Lastly it may be pointed out that for the first 10 days of June deliveries were alleged to be at the rate of nearly 7,000 tons a month or more than half the total monthly export for Malaya. The accused cannot possibly have believed that deliveries to this extent had actually been made.

I feel no doubt therefore that the accused acted dishonestly and was rightly found guilty of cheating on all three charges.

It was also argued that the prosecution had not shown in what way Mr. Van der Lee, the representative of the Java Sumatra Trading Co., had been deceived. It is true that he was not available to give evidence at the beginning of the trial, but the prosecution asked that he should be called under section 436 of the Criminal Procedure Code at the close of the case. This was objected to by accused's counsel. In view of this I think it is impossible to suggest that Mr. Van der Lee was not deceived when it is on evidence that Mr. Folmer, who succeeded him as manager, and Mr. Thornett, the European assistant, were both deceived. It is quite impossible to accept the accused's story that Mr. Van der Lee knew that Koh Eng Hoe was both storekeeper and supplier and that accordingly there was no check on Koh Eng Hoe whatever. I cannot believe that the manager of any firm would be guilty of such gross negligence and incompetence.

It appeared to be assumed by counsel for the appellant that if the accused could have proved that Mr. Van der Lee was aware of the arrangement under which Koh Eng Hoe was supplier as well as storekeeper he would not have been deceived and that accordingly the requirements of Section 415 and 420 of the Penal Code would not have been met. This appears to me to involve a complete misconception. Even if, as is unlikely, Mr. Van der Lee knew of the arrangements, that does not show that he knew that the accused and Koh Eng Hoe were defrauding the Company. I will go further and say that even if Mr. Van der Lee had been a party to the frauds, so far from exonerating the accused, it would have made his crime worse as involving a conspiracy to defraud, and a "person" according to the definition in Section 10 of the Penal Code includes a corporation, and the person deceived in this case was the Java Sumatra Trading Company. The knowledge even of a director is not in law the knowledge of the corporation even when his co-directors have remained in ignorance through their own negligence (see *J. C. Houghton & Co.* v. *Nothard, Lowe & Wills*, 1928 A.C. page 1). For the purpose therefore of the charges against the accused the knowledge of Mr. Van der Lee is quite immaterial, though it is only fair to him to state that there was no evidence whatever that he had any knowledge of the frauds perpetrated by the accused and Koh Eng Hoe.

The above observations cover most of the grounds of appeal. The only ground to which I need refer particularly is ground No. 6 in which the appellant takes exception to the learned District Judge holding that the accused could have known that the Company's storekeeper would defraud his employers. The learned District Judge certainly did so find, but in the view I take of the case this finding was quite superfluous, as I think that the evidence goes much further and shows conclusively that the accused knew that the Company was being defrauded and took an active part in the frauds that were being committed.

It is certainly a remarkable feature of the case that the Java Sumatra Trading Company should have conducted the whole of their copra business, running into hundreds of thousands of dollars, through the accused and the storekeeper without considering for a moment that they might be in league to defraud them and without safeguarding themselves even as to the existance of the supposed stocks except by the most perfunctory checks. Experience has shown that a business conducted on these lines invariably ends in disaster and the directors of the Java Sumatra Trading Company have only themselves to blame. But this does not in the least palliate the offence with which the accused was charged. He was in a position of great trust which he has betrayed. I would, therefore, dismiss the appeal and confirm the conviction and sentence.